



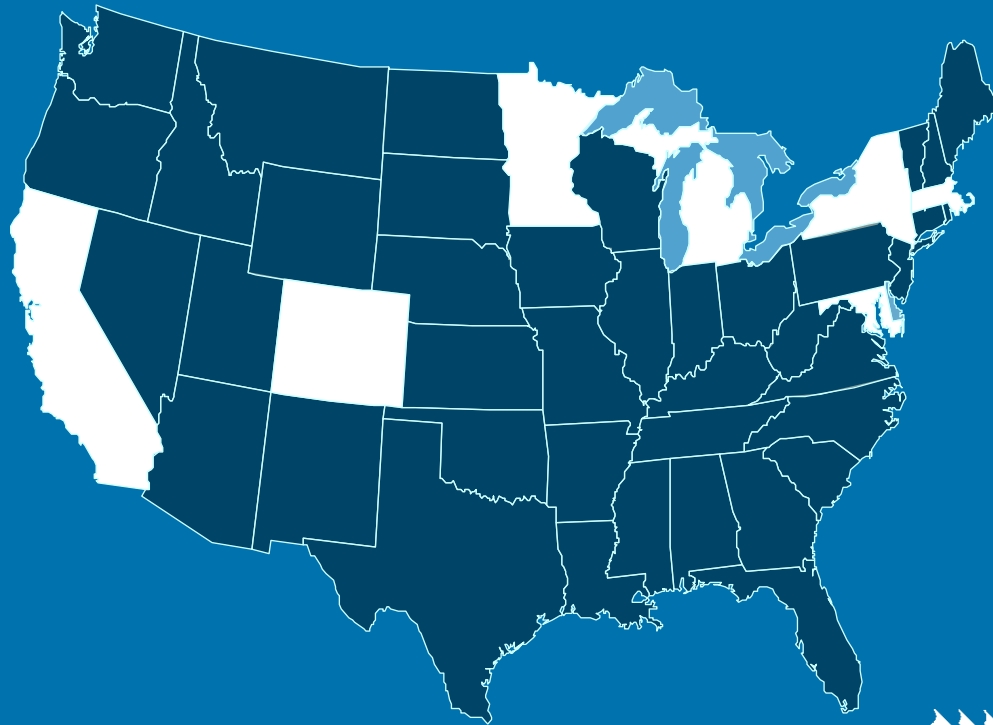
# Tobacco Control Policy Options in the Retail Environment

*Tobacco Control Legal Consortium  
Dave Schaibley  
May 10, 2012*

# Tobacco Control Legal Consortium

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## Consortium Legal Centers



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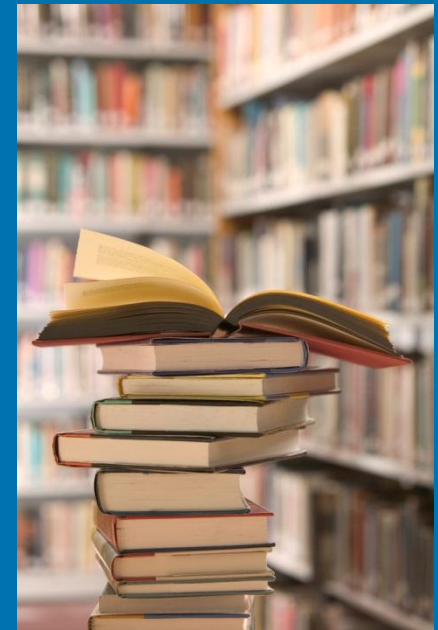
# Who We Serve

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- Advocacy Organizations and Coalitions
- Federal, State, & Local Gov't Attorneys
- Private Attorneys and Individual Citizens
- CDC Grantees and Project Officers
- Other Public Health Professionals



# What We Do





Tips and Tools

### Using Licensing and Zoning to Regulate Retailers

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

#### Licensing and Zoning

State and local governments are interested in monitoring and increasing compliance with tobacco control laws, such as laws prohibiting sales of tobacco products to minors. They are also interested in reducing the rates of youth initiation and adult consumption of tobacco products.<sup>2</sup> Licensing and zoning laws are two long-accepted methods governments may use to accomplish these goals.

The general concept of tobacco licensing is that, consistent with its police power to protect and promote the health of its citizens, a governmental unit can require all businesses that sell tobacco to purchase a license from the government. Zoning ordinances, on the other hand, are generally used to keep incompatible uses of land apart from one another.

Many governments already have a history of applying licensing or zoning laws to businesses such as liquor establishments or gun shops. These existing systems might provide a tried-and-true framework that could be readily adapted to fit the needs of a tobacco control law and might also provide governmental employees who are well-versed in the implementation and enforcement of licensing and zoning laws. This brief guide offers pointers on how governments can use licensing and zoning to control the locations of tobacco retailers and increase compliance with tobacco control laws.

#### Policy Benefits

Ordinances that control access to tobacco products can benefit the public in several ways. To begin with, both licensing and zoning ordinances can enable governments to place conditions on tobacco retailers, such as requiring compliance with tobacco control laws.



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# Policy Options at the Point-of-Sale: Overview

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- What is the point of sale?
- Why worry about it?
- Doesn't the federal law take taking care of it?
- What legal tools can carry out policy options?
- What are some specific point-of-sale objectives?

# What is the Point of Sale?

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# Why Focus on the Point of Sale?

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“We’re adults. You’ve got a group of talented kids. Hence, this letter. We have been asked by our client to come up with a package design that is attractive to kids (young adults)...but no attempt (obvious) can be made to encourage persons under twenty-one to smoke. . . . The package design should be geared to attract a youthful eye ... not the ever-watchful eye of the Federal Government.”

-Lorillard Marketing Firm



# The Tobacco Control Act and the Point of Sale: A Quick Summary

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**Sets certain standards**



**Gives the FDA  
authority to do more**



**Expands, limits, and  
preserves state  
authority**



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# Setting Standards

- Bans flavored cigarettes (but not menthol)
- Prohibits health claims
- Prohibits terms like “light,” “mild,” and “low tar”
- Requires disclosures about the contents of tobacco products



- No sale of tobacco products in conjunction with sale of another FDA regulated product
- Requires FDA approval of new products

# Setting Standards

Larger, more informative warning labels for cigarettes and smokeless tobacco;

- 50% of front and back for cigarettes
- 30% of two principal panel displays for smokeless
- 20% of print advertisements



Litigation on this provision

*Packages and advertising cannot have language that would lead consumers to believe that the product is endorsed by FDA or deemed safe by FDA\**

\* affected by current litigation

# Federal Regulations\*

- No outdoor ads within 1,000 feet of schools and playgrounds \*\*
- No color outdoor advertising; only black on white \*\*\*



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- \* cigarettes and smokeless
- \*\* will be open for comment & rulemaking
- \*\*\* affected by current litigation



# Federal Regulations

- No giveaways of non-tobacco products with the purchase of tobacco products
- No free samples of cigarettes and smokeless tobacco in most instances
- No sale of packages with fewer than 20 cigarettes
- No vending machines or self-service displays of cigarettes or smokeless, except in adult-only facilities\*





# Tobacco Control Act's Impact on State and Local Authority

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- Expands
- Limits
- Does Not Change



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# Expanded State & Local Authority

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## Restrictions on the Time, Place and Manner (but not Content) of Tobacco Product Advertising

(but see the Federal Cigarette Labeling & Advertising Act and the 1st Amendment)





# Limited State & Local Authority

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- No regulation of content or format of warning labels on packages or in advertisements
- No setting of product standards (e.g., how much nicotine), except fire-safe standards



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# Unchanged State & Local Authority

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## Point of Sale Concepts

- Licensing
- Zoning
- Regulating the Sale and Distribution of Products
- Content-Neutral Ad Restrictions
- Legal Age of Purchaser

## Other Concepts

- Pricing Concepts
- Taxation
- Smoke-Free
- Fire-Safe Products

# Legal Vehicles for Advancing Point-of-Sale Concepts

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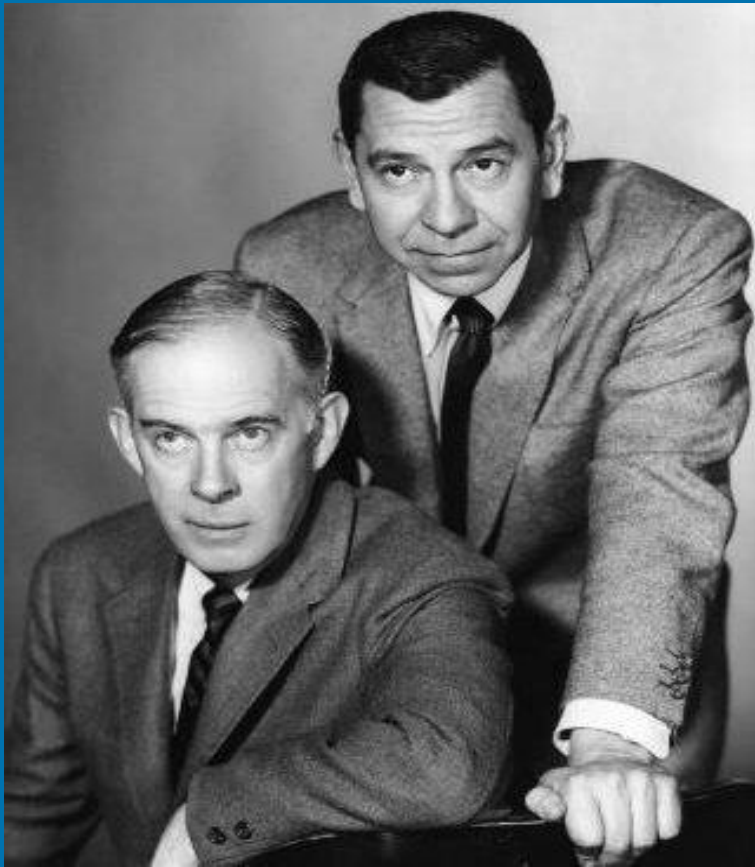


- Licensing
- Zoning
- Stand-Alone



# Licensing: Fundamentals

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- Require Annual Renewal
- Assess Appropriate Fees
- Place Conditions on Retailers
- Use Penalties to Gain Cooperation



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# Licensing: Annual Renewal

No. 83 \$ 10.00

State of West Virginia

**RETAIL LICENSE FOR DEALERS IN CIGARETTES, TOBACCO, ETC.**

Mecholas County, ss:

This is to certify that the undersigned, in pursuance of the authority vested in him by law, has this day granted to E. C. Morris, Merchant of Morris - Mecholas County, West Virginia, a license to sell at retail, cigarettes, cigarette paper or wrappers, cigars, tobacco, snuff and other preparations of tobacco, beginning just day of July 1911, and ending June 30, 1912, and has assessed the license tax at \_\_\_\_\_ Dollars.

Given under my hand this 5 day of July 1911  
P. C. [Signature], Clerk, County Court of Mecholas County.

Received of E. C. Morris, Mer. the sum of Ten Dollars in full of license tax on above certificate, this 7th day of July 1911  
W. M. [Signature] Sheriff, Mecholas County.

POST THIS IN A CONSPICUOUS PLACE.

 **City of Santa Ana Tobacco Retail License**  
City of Santa Ana Ordinance No. 2729

**Application for Tobacco Retail License**  
Mail to: PO Box 1981 M-96  
Santa Ana, CA 92702

This Application is for: ☐ New Permit ☐ Re-Issuing a Revoked Permit  
☐ Annual Renewal ☐ Change of Ownership

**Business Information**

Business Name: \_\_\_\_\_ Phone Number: \_\_\_\_\_

Business Address: \_\_\_\_\_

Business Mailing Address: \_\_\_\_\_

Previous Name of Business at this Address (if any): \_\_\_\_\_

State of California Board of Equalization Tobacco Retail License #: \_\_\_\_\_

**Owner Information**

#1 Owner/Operator Name: \_\_\_\_\_ Home/Cell Number: \_\_\_\_\_ Drivers License: \_\_\_\_\_

#2 Owner/Operator Name: \_\_\_\_\_ Home/Cell Number: \_\_\_\_\_ Drivers License: \_\_\_\_\_

**ANNUAL TOBACCO PERMIT FEE—\$635.00**

Please submit payment to CITY OF SANTA ANA with your application.

A Tobacco Retail License from the City of Santa Ana is required before retailing any tobacco, tobacco products, or paraphernalia, and is contingent upon the observance of ALL federal, state, and local tobacco laws. Selling tobacco without a license is a serious offense, and could result in substantial penalties including fines and the denial of future City of Santa Ana Tobacco Retailing Permits. Permits are issued to fixed addresses only, and each address requires a separate permit.

I hereby apply for a tobacco retailing permit with the appropriate fees attached, to operate at the above address in the City of Santa Ana and I also state that the information given on this form is true and correct.

Owner(s): \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**FOR OFFICE USE ONLY**

Permit/License Number: \_\_\_\_\_ Effective Date: \_\_\_\_\_

Payment: \_\_\_\_\_ Date Rec'd: \_\_\_\_\_ By: \_\_\_\_\_



# Licensing: Appropriate Fees

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# Licensing: Conditions for Retailers

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- Existing Laws
- Sales to Minors
- Sales by Minors
- Advanced Options

*Why prohibit something already prohibited?*

# Licensing: Gaining Compliance

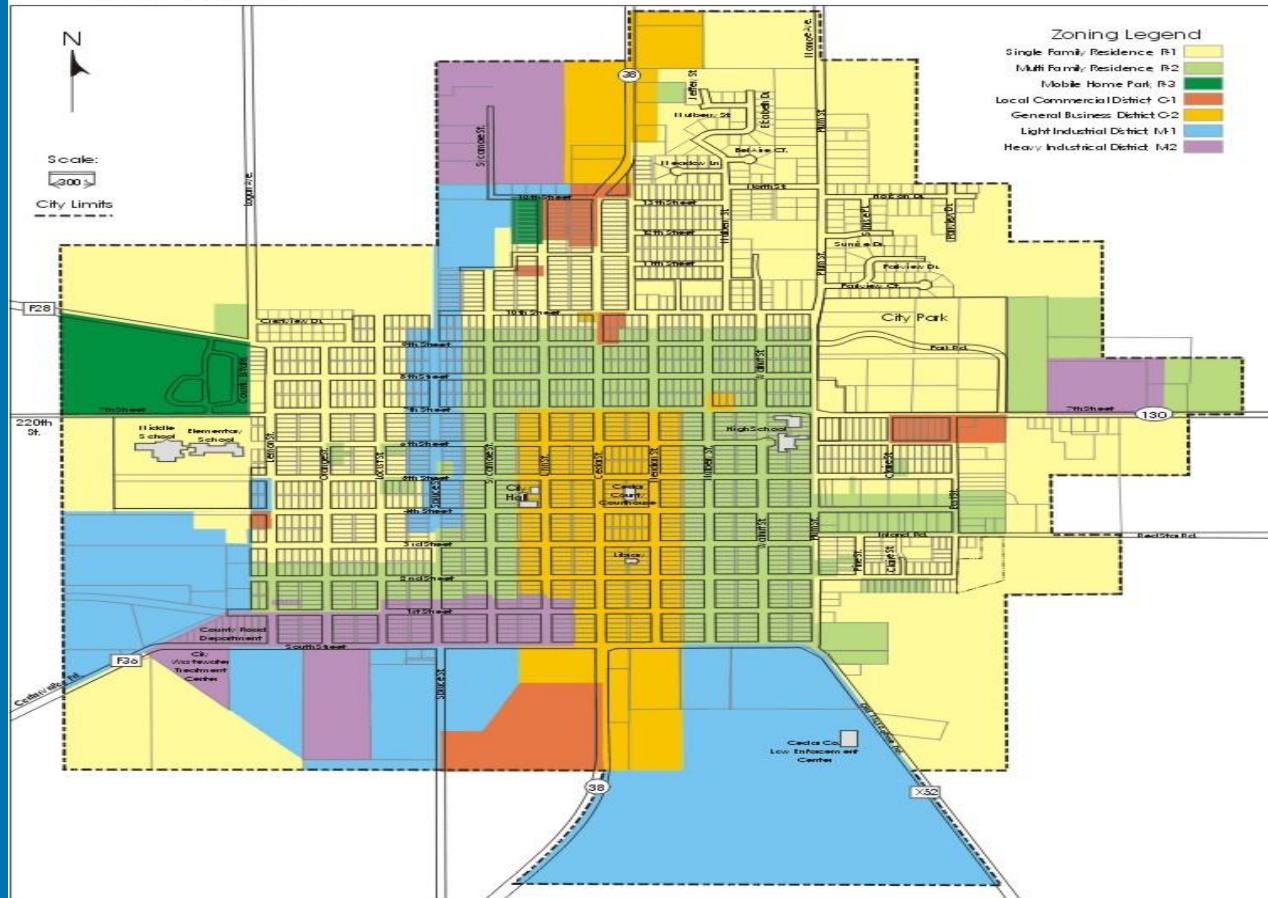
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- Enforcement Agency
- Inspections
- Fines
- Suspension
- Revocation



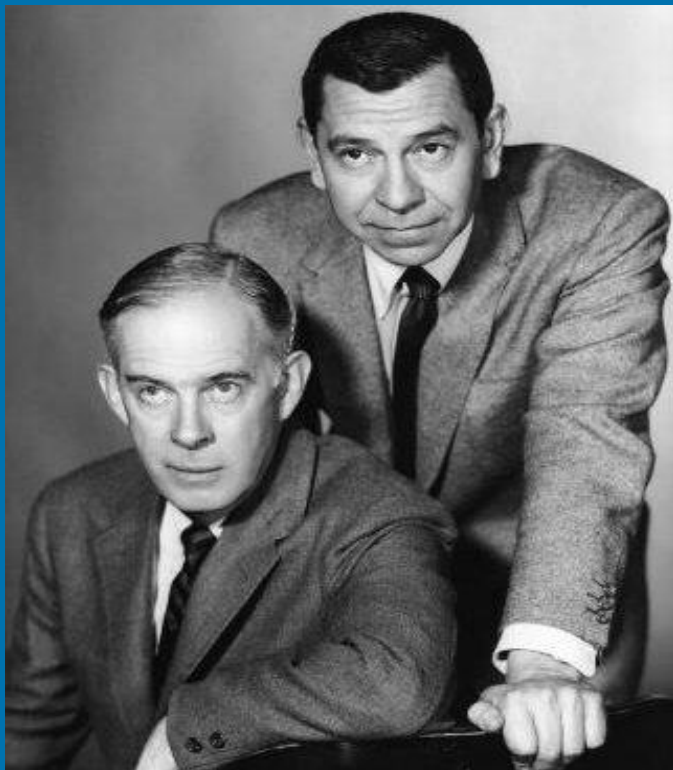
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# Zoning: Fundamentals

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- Local, local, local
- Permitted Uses
- Prohibited Uses
- Conditional Use Permits



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# Zoning: Conditional Use Permits

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- Allows Zoning to Operate Like Licensing
- Apply Conditions to New Retailers
- Permit Granted if Conditions are Met
- Permit Rescinded if Conditions are Violated

# Zoning and CUPs: Basic Conditions

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## Require Compliance with Tobacco Laws

- Federal, State and Local Laws
- Sales to Minors
- Sales by Minors
- Smoke-Free Laws

But laws already prohibit those actions; why prohibit something already prohibited?

# Licensing/Zoning: Which Should We Use?

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- Preemption
  - KRS 438.300: State law supersedes local laws that regulate the “use, display, sale, or distribution of tobacco products.”
  - Case law seems to limit that idea.
- Authority
  - Home Rule statutes give local governments authority to license to advance health, welfare, etc.
  - KRS 100.201 gives local governments the power to zone.

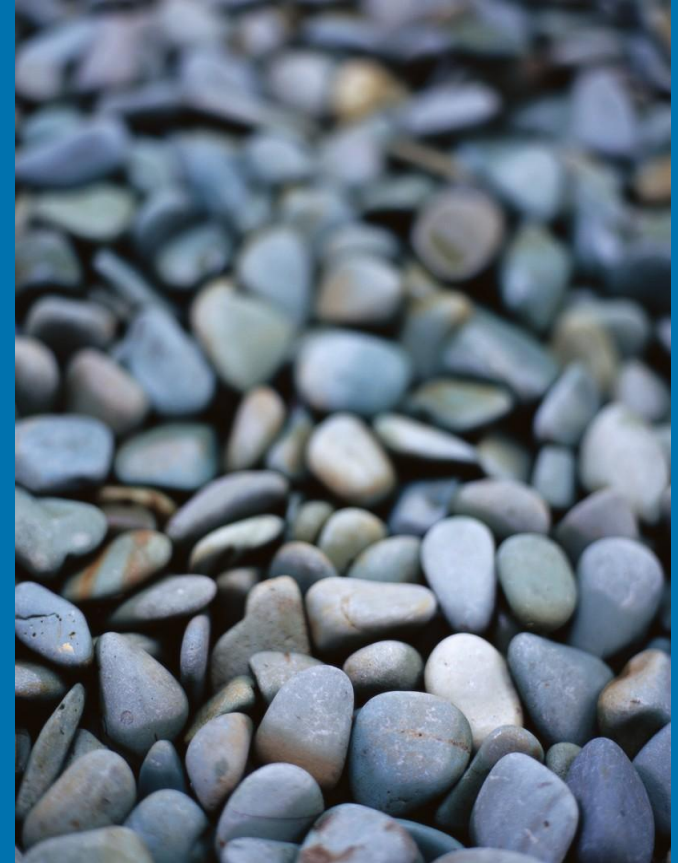




# Licensing/Zoning: Which Should We Use?

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- Your Goals
- Political Support
- Current Use of Either Option in your Community



# Licensing and Zoning: Summary

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- Legally Sound
- Familiar To Lawmakers
- Effective
- Enforceable
- Versatile
- Authority
- Goals
- Evidence Base
- Legal Input



# Point of Sale: Policy Options

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- “You should close all the stores that sell cigarettes. And check them all the time. Night and day.”
- “You should move all the stores away from the schools and never ever let the people that have the stores move them back.”

Elizabeth: Age 3 1/2

# Policy Options: Product Placement

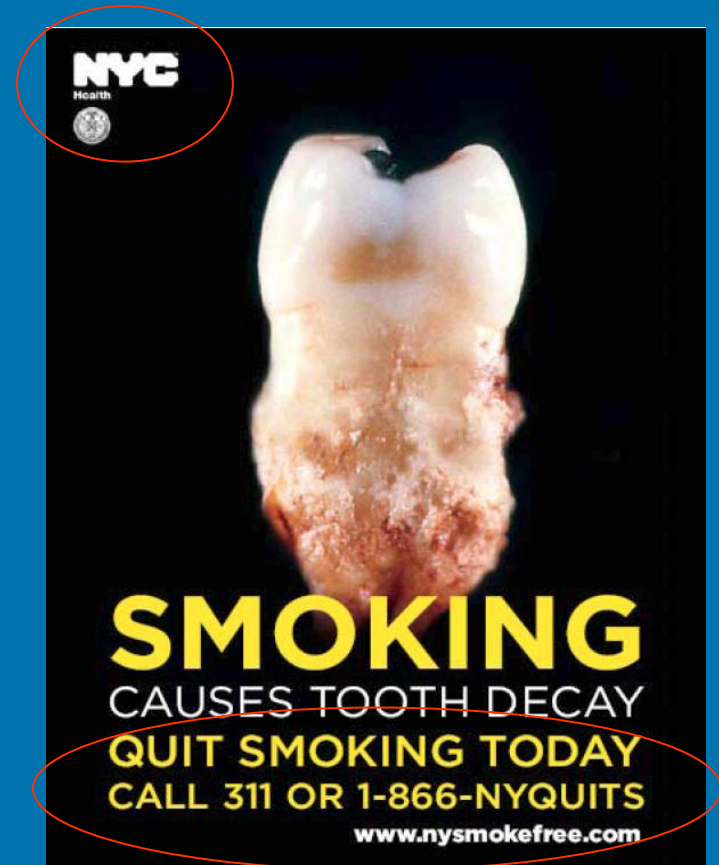




# Policy Options: Tobacco Ads



# Policy Options: Graphic Warning Signs



# Policy Options: Retail Stores

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## Restricting Retailers

- Location:
  - Limit where they can be
- Density
  - Limit numbers in areas
- Quantity
  - Limit overall number
- Type
  - Pharmacies



# Policy Options: Additional Conditions

- Sales Restrictions
- Coupons
- Samples
- Loosies
- Flavored OTPs
- Vending Machines
- Mobile Vendors
- Temporary Events





# What Are Some Legal Hurdles?

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- Preemption
- Takings
- First Amendment
- Due Process
- Equal Protections
- Special Legislation



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# Policy Options at the Point-of-Sale

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Questions?

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